ENVIRONMENTAL LAW ISSUES AT FORT SILL, OK

Russell D. Bennett, Environmental Atty.
Administrative and Civil Law Division
Office of the Staff Judge Advocate
Fort Sill, Oklahoma
February 2010

AGENDA

- Federal Environmental Laws
- CWA and CAA
- Army Real Property Holdings
- NEPA, BRAC and RCI
- Endangered Species
- Cultural Resources & Historic Preservation
- Current Litigation
- Questions

Major Federal Environmental Protection Statutes Enacted During the 1970's

- **1970 National Environmental Policy Act (NEPA) ***
- **1970 Clean Air Act (CAA) ***
- **1972 Clean Water Act (CWA) ***
- **1972 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)**
- **1972 Noise Control Act**
- **1972 Coastal Zone Management Act**
- **1972 Marine Mammal Protection Act**
- **1973 Endangered Species Act (ESA) ***
- **1974 Safe Drinking Water Act (SDWA) ***
- **1974 Forest Rangeland Renewable Resources Planning Act**
- **1975 Federal Coal Leasing Act Amendments**
- **1976 Toxic Substances Control Act (TSCA)**
- **1976 Resources Conservation and Recovery Act (RCRA) ***
- **1976 National Forest Management Act**
- **1976 Federal Land Policy and Management Act**
- **1976 Magnuson-Stevenson Fisheries Management Act**
- **1977 Clean Air Act Amendments ***
- **1977 Clean Water Act Amendments ***
- **1977 Surface Mining Control and Reclamation Act**
- **1978 Outer Continental Shelf Lands Act**

*** Laws most frequently applied at Fort Sill**

The Second Decade (and beyond) of Federal Environmental Statutes
1980-1992

- 1980 Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) a/k/a "Superfund" *
- 1980 Alaska National Interest Lands Conservation Act
- 1984 Hazardous and Solid Waste Act Amendments *
- 1986 Emergency Planning and Community Right to Know Act *
- 1986 Safe Drinking Water Act Amendments *
- 1986 Superfund Amendments and Reauthorization Act
- 1986 Asbestos Hazard Emergency Response Act (AHERA) *
- 1987 Water Quality Act of 1987
- 1988 Medical Waste Tracking Act
- 1990 Oil Spill and Pollution Prevention Act
- 1990 Clean Air Act Amendments *
- 1992 Federal Facilities Compliance Act *

* Laws most frequently applied at Fort Sill

Federal Environmental Laws: An Example of Expanding Scope

Statute	Statutes at Large
Clean Air Act of 1963	11 pages
Clean Air Act of 1970	38 pages
Clean Air Act of 1977	112 pages
Clean Air Act of 1990	314 pages

Federal Environmental Laws: Complex Gibberish?

"The *Clean Water Act* is an enigmatical piece of legislation. Filled with more sesquipedalian jargon than a year's subscription to any trade journal and a byzantine system of cross references, its cross references are virtually indecipherable."

Citizens Coal Council v. U.S. EPA (6th Circuit, October, 2004)

Federal Environmental Laws: General Categories

- Command and Control/Compliance – **Example:** Clean Water Act, Clean Air Act, Safe Drinking Water Act

- Liability/Clean-up – **Example:** CERCLA, Resource Conservation and Recovery Act (RCRA)

- Environmental Assessment and Planning – **Example:** NEPA, National Historic Preservation Act (NHPA)

- Disclosure – **Example:** Emergency Planning and Community Right to Know Act of 1986, CWA, CAA

- Preservation and Conservation – **Example:** Endangered Species Act, Migratory Bird Treaty Act of 1916, NHPA

CLEAN WATER ACT (CWA)

• CWA's purpose as changed in 1972 was to **"*restore and maintain the chemical, physical, and biological integrity of the Nation's waters***." (Section 101) and make navigable waters free of pollutant discharges by 1985

• The following five strategies were employed, through the CWA, to achieve these goals:

- A system of minimum national effluent standards for each industry was created
- Water quality standards were set
- A discharge permit program was created (NPDES permits)
- Provisions for special problems (such as toxic chemicals and oil spills) were established
- A revolving construction loan program for publicly owned treatment works (POTWs) was established

• AND to assure that POTWs remained current required that treatment works be operated with the *"best current technology available."*

CLEAN AIR ACT (CAA)

- CAA establishes National Ambient Air Quality Standards (NAAQS)

 - Set by EPA on the basis of "the best scientific knowledge"

 - State have primary responsibility for attaining and maintaining the NAAQS in all areas of their state

- State Implementation Plan (SIP)

 - State sets specific guidelines to reduce emissions that deviate from Federal standards

 - SIP must be adopted by the State Legislature and submitted for EPA approval

 - After approval, SIP is federally enforceable if a State fails to act

 - EPA must implement a Federal Implementation Plan (FIP) is a State fails to adopt a SIP

ARMY REAL ESTATE

ACREAGE: More than the combined acreage of the states of New Jersey, Rhode Island, Delaware, and Connecticut	**17 Million Acres**
STATES:	**50 States, DC, Territories**
BUILDINGS:	**165,289 Buildings**
SQUARE FEET: Equal to 166 Pentagons	**1.1 Billion SF**
HISTORIC PROPERTIES:	**12,000 Buildings**
CULTURAL PROPERTIES:	**36,000 Sites**
ARCHEOLOGICL SITES	**53,000 Sites**
MAINTENANCE COSTS:	**$2.1 Billion**
INSTALLATIONS: Six times as many installations as the Air Force, Navy and Marines.	**4,162 Installations**
RESTORATION SITES:	**12,000 Sites**
ROADS: More than the combined totals of paved roads for the states of Delaware, Connecticut, and Rhode Island	**28,743 Miles**
ELECTRIC LINES: More than 12 times across the United States	**23,754 Miles**
RAILROADS: Army rails stretch nearly coast to coast	**2,910 Miles**
WATER LINES: More than 4 times across the United States	**12,955 Miles**
SEWAGE LINES: More than 2 times across the United States	**7,930 Miles**
POLLUTION CONTROL PERMITS: Army permits equal 47% of all DOD permits.	**2,500 Permits**
ENDANGERED SPECIES: Distinct endangered species exist on or contiguous to 94 Army installations.	**170 Species**

FORT SILL REAL ESTATE

- **Acreage:** 93, 569 acres
- **Square Miles:** Approx. 147
- **Cantonment Area:** Approx. 24 square miles (Lawton Annexed 1998)
- **Buildings:** Approx. 3,400
- **Historic Buildings:** 575 +
- **Archaeological Sites:** 325 +
- **National Register Sites:** 7
- **Roads:** 7,088 miles
- **Electric Lines:** 399 miles
- **Railroads Lines:** 24 miles
- **Water Lines:** 115 miles
- **Sewer Lines:** 96 miles
- **Total Annual Economic Impact of Fort Sill:** $ 1.5 Billion
- **New Construction Post BRAC 2005:** $ 1.1 Billion
- **No. of Endangered Species:** **1**

NEPA, BRAC and RCI

- National Environmental Policy Act (NEPA) is a "planning" statute

- "Hard Look" at environmental consequences of government actions that have "significant" impacts

- Three types of review: Categorical Exclusion (CX), Environmental Assessment (EA), Environmental Impact Statement (EIS)

- "Citizen" suits by advocacy groups
 - Challenge adequacy of analysis and process
 - Seek Injunction = stop federal action!

- Potential Concerns
 - Segmentation
 - Cumulative Impact
 - Alternatives – Must Study "No Action Alternative"

NEPA, BRAC and RCI

• CXs are routine activities (maintenance, normal operations, routine training) that has been determined not to have significant impact

• 90 – 95% of Fort Sill's NEPA analysis result in CXs; regulatory directions on NEPA are found at 32 CFR Part 651, a/k/a Army Regulation (AR) 200-2

• Fort Sill prepares 12 to 15 EAs per year. An EA concludes with a Finding of No Significant Impact (FONSI) or necessity for an EIS. Fort Sill has not undertaken the preparation of an EIS since 1988

• Two most significant EAs completed in the last 4 years:

Nov. 2006 - Implementation of 2005 BRAC Recommendations

Aug. 2008 – Residential Communities Initiative (RCI): privatization of Army family housing to Picerne Military Housing, effective 10/1/08

• Recent CX (Sept. 2009) of importance: Privatization of Army Lodging (PAL)

Endangered Species Act (ESA)

- Strictly Construed – 16 USC § 1531 et seq.

- Administered by Fish & Wildlife Service (FWS) and National Marine Fisheries Service (NMFS)

- Protects endangered and threatened species and their critical habitat
 - Conserve endangered and threatened species
 - Consult with FWS/NMFS if federal action may jeopardize continued existence of species or adversely modify critical habitat
 - No "take" without Incidental Take Statement (ITS)
 - "Take" means to harass, harm, pursue, hunt , shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct

Endangered Species Act (ESA)

- Formal Consultation with FWS starts with Biological Assessment (BA) – prepared by federal agency

- FWS issues Biological Opinion (BO) based on BA:
 1. No Jeopardy = Incidental Take Statement
 2. Jeopardy, but reasonable and prudent alternatives = Incidental Take Statement
 3. Jeopardy

- Jeopardy Opinion terminates action (appealable)

- Fort Sill has one! Only one, thankfully! The *Black-capped vireo*

- Fort Sill Endangered Species Management Plan

Cultural Resources & Historic Preservation

Section 106 of the National Historic Preservation Act provides:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state and the head of any Federal Department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking in any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title of this Act a reasonable opportunity to comment with regard to such undertaking."

Cultural Resources & Historic Preservation

Section 106 broken down –

"…**any Federal agency having** direct or indirect **jurisdiction over a proposed Federal or federally assisted undertaking** ….having authority to license any undertaking **shall, prior to approval of the expenditure of any Federal funds** on the undertaking or prior to the issuance of any license,…**take into account the effect of the undertaking in any** district, **site, building**, structure, or object that is **included in or eligible for inclusion in the National Register. The…Federal agency shall afford the Advisory Council** on Historic Preservation…**a reasonable opportunity to comment** with regard to such undertaking."

36 CFR 800.16(y) defines an **undertaking** as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval"

Cultural Resources & Historic Preservation

Participants in the Section 106 Consultation Process:

- Federal Agency (Fort Sill)
- Advisory Council on Historic Preservation (ACHP)
- Consulting Parties:
 - Oklahoma State Historic Preservation Officer (SHPO)
 - Indian Tribes
 - Local governments
 - Applicants
 - Other parties with a "demonstrated interest"
- Public

Cultural Resources & Historic Preservation

Native American/ Indian Tribes that are culturally or historically affiliated with Fort Sill include:

1. Comanche Nation
2. Kiowa Tribe of Oklahoma
3. Apache Tribe of Oklahoma
4. Fort Sill Apache Tribe
5. Delaware Nation
6. Wichita and Affiliated Tribes of Oklahoma
7. Caddo Nation
8. Cheyenne and Arapaho Tribes of Oklahoma
9. Chickasaw Nation

Cultural Resources & Historic Preservation

Fort Sill currently utilizes a three phased approach to consultations (with a caveat).

Phase I – confirm with the SHPO *only* the direct and indirect Area of Potential Effects (APE), the appropriate consulting parties, and permission to pursue expedited consultation.

Phase II – seek and gather information on historic properties that may be affected by the undertaking from the consulting parties.

Phase III – document the finding (whether it does or does not have the potential to affect historic properties) and provide to the consulting parties for their review.

Caveat – if it is determined that there is the potential to adversely affect a historic property, then mitigation prolongs the process.

Current Litigation: *Comanche Nation v. United States*

- **August 2008** - Fort Sill, thru Tulsa District COE, let a contract for the construction of a new Training Service Center (TSC) warehouse located near intersection of Currie and Randolph Roads, backside (south face) of Medicine Bluffs. Bluffs are sacred, cultural site, listed on National Register of Historic Places. Part of BRAC 2005 construction projects.

- **10 Aug 08** - Commenced construction of 40,000 sq. ft. building on 2 acre site, $ 7 million

- **15 Aug 08** - Comanche Nation, and single Tribal member, filed Complaint in U.S. District Court, Western Dist. of OK, Case No. CIV-08-849-D, seeking TRO, preliminary and permanent injunction against construction, alleging violation of;
 - **--** Consultation requirements of the National Historic Preservation Act (NHPA) &
 - **--** Individual and Tribal rights under Religious Freedom Restoration Act (RFRA)

- **18 Aug 08** – Court entered TRO

- **10–15 Sep 08** – Preliminary Injunction (PI) hearing and hearing on United States Motion to Dissolve TRO – including judicial site of Fort Sill construction location.

- **23 Sep 08** - Court granted PI enjoining US/Army from constructing TSC

Current Litigation: *Comanche Nation v. United States,* cont.

- **Oct. 2008** – Fort Sill decided to locate the TSC warehouse elsewhere on the installation; terminated the construction contract and cleared the site. (And, indeed, construction of the TSC at the new location began in late 2009, without objection).

- **30 Oct 08** – US filed Motion to Dismiss, claiming the Complaint was rendered moot.

- **14 Nov 08** – Comanche Nation amended complaint, claiming they wanted an expanded Injunction against future construction/development of an entire 55-acre parcel of land, of which the original 2-acre site was a part.

- **12 Feb 09** – Parties jointly requested a stay pending a US Supreme Court decision on a cert. petition from the 9th Circuit on a similar RFRA issue.

- **13 Feb to 8 Jun 09** – Case in hiatus until Supreme Court denied cert. on the RFRA case from the 9th Circuit.

- **28 Sep 09** – US files Motion to Dismiss amended Complaint.

- **Where we are now & Attorney's Fees** (Doesn't always come down to?)

Current Litigation: *Harlyn Geronimo v. Barack Obama*

• **17 Feb 09** – Harlyn Geronimo, and 20 other alleged "lineal descendants" of a the famous Apache warrior (and former Fort Sill POW) file suit in the US District Court for the District of Columbia, Case No. 1:09 CV-00303; claiming they are entitled to the human remains of Geronimo under the provisions the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). Plaintiffs seek to return Geronimo's remains "to his native land, the headwaters of the Gila River … in southwestern New Mexico.

• **17 Feb 09** – Just happens to be the 100th anniversary of Geronimo's death at Fort Sill

• **Named Defendants** – In addition to President Obama, defendants are the Secretary of Defense, Secretary of the Army, **Yale University and the "Order of the Skull Bones",** an unincorporated association on the Yale campus

• **5 May 09 -** Robert Geronimo, and 22 other "lineal descendants" of Geronimo petitioned to intervene, claiming they are the true "lineal descendants"; and requesting that the US and all other parties be enjoined from "disturbing Geronimo's grave."

Current Litigation: *Harlyn Geronimo v. Barack Obama,* cont.

- **10 June 09** – US filed a Motion to Dismiss, basically asserting that that the original Plaintiffs have no cause of action under NAGPRA

- **Fort Sill Apache Tribe** - has also file a petition in intervention and in support of the Robert Geronimo faction of "lineal descendants."

- **Who are the real "lineal descendants" ?** (assuming a valid cause of action)

- **Former Attorney General** represents original plaintiffs (Harlyn /Geronimo faction)

QUESTIONS